Office-Supreme Court, U.S.
FILED
AUG 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545

ANNE B. ZIPES, *et al.*, *Petitioners*,

v.

TRANS WORLD AIRLINES, INC., *Respondent*,

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *Petitioner*,

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*, *Respondents*.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PLAINTIFF CLASS

A. RAYMOND RANDOLPH, JR.
SHARP, RANDOLPH & GREEN
Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 659-2400

KEVIN M. FORDE
111 W. Washington Street
Chicago, Illinois 60602
(312) 726-5015

ARAM A. HARTUNIAN
55 E. Monroe Street
Chicago, Illinois 60603
(312) 372-6475

ARNOLD I. SHURE
10 S. LaSalle Street
Chicago, Illinois 60603
(312) 346-4537

Counsel for Anne B. Zipes, et al.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

Former Section 706(d) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-5(d) (1970)) provided that an aggrieved person must file a charge with the Equal Employment Opportunity Commission within 90 days of the alleged unlawful employment practice. Upon receipt of a "right-to-sue" letter from the EEOC, the aggrieved person may file a civil action in federal court against the respondent named in the charge.

The question presented in No. 78-1545 is:

Whether the 90-day requirement of former Section 706(d) is subject to waiver or estoppel in a civil action in federal court.

To the extent that the two questions presented in No. 80-951 differ from the question presented in No. 78-1545 in light of the union's arguments, both questions may be stated as follows:

Whether the district court properly approved the settlement agreement and ordered retroactive seniority regardless of how this Court ultimately interprets former Section 706(d).

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT 3

A. The Original Complaints and the Airlines' Answers 3

1. TWA's "No-Mothers" Policy 3

2. The Complaints Against TWA and American Airlines 4

3. The Answers to the Complaints 5

B. The Proposed 1971 Settlements of the Cases ... 5

C. Replacement of the Union as Class Representative 7

D. TWA's Attempt to Raise A "Statute of Limitations" Defense 7

E. The District Court's Rulings that TWA Had Engaged in Unlawful Sex Discrimination Against *All* Class Members and that the Court Had Jurisdiction 8

1. The District Court's Finding of Illegal Sex Discrimination 8

2. The District Court's Finding of Jurisdiction 9

F. The Decision of the Court of Appeals in No. 78-1545 that TWA Had Engaged in Illegal Sex Discrimination but that the District Court Lacked Jurisdiction Over the Claims of Some Class Members 10

G. The 1979 Settlement Agreement 11

1. Designation of Subclass A and Subclass B . 11

2. The Proposed Settlement Agreement and the Orders of the District Court 12

Table of Contents (Continued)

PAGE

H. The Decision of the Court of Appeals Sustaining the District Court's Orders 14

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. The Union's Arguments Misconceive the Nature of This Case 17

II. The Timely Filing of Charges with the EEOC Pursuant to Former Section 706(d) Is Not a Jurisdictional Requirement 23

III. Regardless of How This Court Construes Former Section 706(d), The District Court Properly Approved the Settlement and Ordered Retroactive Seniority 35

CONCLUSION 42

TABLE OF AUTHORITIES

CASES: PAGE

A. H. Belo Corp. v. *NLRB*, 411 F.2d 959 27

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 .....28, 31

Alger v. *Hayes*, 452 F.2d 841 33

Alexander v. *Gardner-Denver Co.*, 415 U.S 36 .....28, 38

Burnett v. *New York Central Railroad Co.*, 380 U.S. 424 .....30, 34

Cannon v. *University of Chicago*, 441 U.S. 677 27

Carlile v. *Smith Routt School District*, 10th Cir. No. 80-1330, decided July 6, 1981 25

Carson v. *American Brands, Inc.*, _____ U.S. _____, 101 S.Ct. 993.....33, 35, 38, 42

Chase Securities Corp. v. *Donaldson*, 325 U.S. 304 32

Coke v. *General Adjustment Bureau, Inc.*, 640 F.2d 584.....24, 25, 26, 27 28, 29, 30, 31, 32

Delaware State College v. *Ricks*, _____ U.S. _____, 101 S.Ct. 498 .....29, 30

Electrical Workers v. *Robbins & Myers, Inc.*, 429 U.S. 229.....28, 29, 31, 32

Franks v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 .....28, 31, 40

Hart v. *J. T. Baker Chemical Co.*, 598 F.2d 829 32

Heymann v. *Tetra Plastics Corp.*, 640 F.2d 115 25

High v. *Braniff Airways, Inc.*, 594 F.2d 1330 40

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 28

Kephart v. *Institute of Gas Technology*, 581 F.2d 1287 .. 25

Laffey v. *Northwest Airlines, Inc.*, 567 F.2d 429.....26, 27

Love v. *Pullman Co.*, 404 U.S. 522..... 33

Matthews v. *Eldridge*, 424 U.S. 319..... 34

Table of Authorities (Continued)

CASES:	PAGE
McArthur v. *Southern Airways*, 569 F.2d 276	24
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	28
Mohasco Corp. v. *Silver*, _____ U.S. _____, 100 S.Ct. 2486 (1980)	26, 29, 30
Movement for Opportunity and Equality v. *General Motors Corp.*, 622 F.2d 1235	25
Oaxaca v. *Roscoe*, 641 F.2d 388	24
O'Brien v. *AVCO Corp.*, 309 F.Supp. 703	20
Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355	29
Oscar Mayer & Co. v. *Evans*, 411 U.S. 750	28
Pierce v. *County of Oakland*, 6th Cir., No. 79-1684, decided July 2, 1981	25
Protective Committee for Independent Stockholders v. *Anderson*, 390 U.S. 414	37
Reed v. *Rhodes*, 549 F.2d 1046	20
Reed v. *Rhodes*, 549 F.2d 1050	20
Schweiker v. *Wilson*, _____ U.S. _____, 101 S.Ct. 1074	32
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572	27
Smith v. *American President Lines, Ltd.*, 571 F.2d 102	32
Snyder v. *Harris*, 394 U.S. 332	30
Speed Shore Corp. v. *Denda*, 605 F.2d 469	38
United Airlines, Inc. v. *Evans*, 431 U.S. 553	28, 29
United Airlines, Inc. v. *McDonald*, 432 U.S. 385	29, 31, 40
United States v. *Armour & Co.*, 402 U.S. 673	35, 38
Weinberger v. *Salfi*, 422 U.S. 749	32, 34
Williams v. *First Nat'l Bank*, 216 U.S. 582	38

Table of Authorities (Continued)

CASES:	PAGE
Zahn v. *International Paper Co.*, 414 U.S. 291	30

STATUTES:

28 U.S.C. §1254(1)	2
28 U.S.C. §1292(b)	10, 20
29 U.S.C. §160(b)	27
29 U.S.C. §626(d)(1)	24, 28
42 U.S.C. §405(g)	34
42 U.S.C. §2000e-2(a)	8, 11
42 U.S.C. §2000e-2(e)	5
42 U.S.C. §2000e-2(h)	5
42 U.S.C. §2000e-5(d)	i, 8
42 U.S.C. §2000e-5(e)	8
42 U.S.C. §2000e-5(f)(3)	26
45 U.S.C. §56	34

FEDERAL RULES OF APPELLATE PROCEDURE:

Rule 8(a)	20

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 8(c)	30, 34
Rule 23(b)(3)	7
Rule 23(e)	39
Rule 41(a)(1)	39
Rule 62	20

Table of Authorities (Continued)

MISCELLANEOUS:	PAGE
110 Cong. Rec. (1964):	
p. 7243	26
p. 12723	26
118 Cong. Rec. (1972):	
p. 7166	28
p. 7167	28
H.R.Rep. No. 238, 92d Cong., 2d Sess. (1971)	27
H.R.Conf. Rep. No. 950, 95th Cong., 2d Sess. (1978)	28
S.Rep.No. 415, 92d Cong., 2d Sess. (1971)	27
American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (1969)	33
Developments in the Law — Statutes of Limitations, 63 *Harv. L. Rev.* 1177 (1950)	25
5 Wright & Miller, *Federal Practice & Procedure*, §1278 (1969)	34
7A Wright & Miller, *Federal Practice & Procedure*, §1797 (1972)	39
Jackson & Matheson, The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits, 67 Geo. L. J. 811 (1979)	26, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545 and 80-951 (Consolidated)

No. 78-1545

ANNE B. ZIPES, *et al.*, *Petitioners,*

v.

TRANS WORLD AIRLINES, INC., *Respondent,*

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *Petitioner,*

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PLAINTIFF CLASS

OPINIONS BELOW

The opinion of the court of appeals in No. 78-1545 (*In re Consolidated Pretrial Proceedings in the Airline Cases*) is reported at 582 F.2d 1142 (1978), and is reprinted in Pet. App. No. 78-1545, at pp. A1-A17. The relevant opinions of the district court are reprinted in Pet. App. No. 78-1545, at pp. A21-A25; and I J.A. 126a-129a, 130a-134a.

The opinion of the court of appeals in No. 80-951 (*Air Line Stewards and Stewardesses Ass'n, Local 550* v. *Trans World Airlines, Inc.*) is reported at 630 F.2d 1164 (1980), and is reprinted in Pet. App. No. 80-951, at pp. 1a-10a. The orders of the district court rejecting the union's arguments

regarding jurisdiction, approving the settlement and awarding seniority are reprinted in Pet. App. No. 80-951, at pp. 13a-19a.

The court of appeals rendered three other decisions in the course of this litigation: *Air Line Stewards and Stewardesses Ast'n, Local 550* v. *American Airlines, Inc.*, 455 F.2d 101 (1972); *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (1973), *cert. denied*, 416 U.S. 993 (1974); *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (1978), *cert. denied*, 439 U.S. 876 (1978) (companion case).

JURISDICTION

The judgment of the court of appeals in No. 78-1545 was entered on August 24, 1978 (Pet. App. No. 78-1545, at A18). The court of appeals denied a timely petition for rehearing on January 11, 1979 (*id.* at A19-A20). The petition for a writ of certiorari was filed on April 10, 1979, and granted on March 9, 1981. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

The judgment of the court of appeals in No. 80-951 was apparently entered on June 13, 1980.[1] The court of appeals denied a timely petition for rehearing on September 17, 1980 (Pet. App. No. 80-951, at 11a-12a). The petition for a writ of certiorari was filed on December 12, 1980, and granted on March 9, 1981. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

On May 18, 1981, the Court entered an order limiting the writ of certiorari in No. 80-951 to questions 1 and 2 in the certiorari petition and dismissing the writ as improvidently granted with respect to question 3 (see Pet. No. 80-951, at p. ii; II J.A. 212).

---

[1] Petitioner union did not include in its petition for a writ of certiorari a copy of the judgment; June 13, 1980, is the date of the opinion.

STATEMENT

This litigation reaches the Court after eleven years of proceedings and four opinions of the court of appeals.[2] During this period, three different unions have acted as the collective bargaining agent for TWA flight attendants.[3] In 1970 the first union brought the lawsuit that nine years later resulted in the settlement now opposed by the latest union. Much of this union's Brief is based on factual assertions that in the long history of this case TWA has never been found to have engaged in unlawful employment practices when it discharged flight attendants who became mothers between 1965 and 1970;[4] that the settlement agreement conferred jurisdiction on the district court;[5] that in the settlement agreement TWA granted retroactive competitive seniority to plaintiff class members;[6] and that according to the record, "hundreds" of class members whose claims were jurisdictionally barred will be returning to the bargaining unit as flight attendants.[7]

Since these factual assertions and others made by the union are not accurate, we offer this statement so that the history of this litigation may be correctly understood.

---

[2] Or five, if one includes the 1978 opinion affirming the district court's approval of the settlement in the consolidated American Airlines case (see note 18 *infra*).

[3] See note 16 *infra*.

[4] Compare Union Brief, at pp. 29, 30, 37, 49, with pp. 8-9, 20, 37 *infra*.

[5] Compare Union Brief, at pp. 37, 41, with pp. 9, 20-21, 36-37 *infra*.

[6] Compare Union Brief, at pp. 18, 21-23, with pp. 13-14, 18-19 *infra*.

[7] Compare Union Brief, at p. 11, 50, with p. 13 *infra*.

A. The Original Complaints And The Airlines' Answers

1. TWA's "no-mothers" policy.

Prior to 1970, TWA followed a practice of removing flight attendants from flight duty while they were pregnant and permanently discharging them if they became mothers (by giving birth or adopting a child) unless they accepted a non-flight position.[8] Pet. App. No. 78-1545, at A2. On the other hand, male flight attendants (or "pursers" under TWA's prior designation)[9] could remain on flight duty after becoming a parent although their responsibilities were substantially the same as those of female flight attendants. *Id.* at A2-A3.[10]

2. The complaints against TWA and American Airlines

On August 18, 1970, in the United States District Court for the Northern District of Illinois, the collective bargaining representative of TWA and American Airlines flight attendants filed suits against both airlines under Title VII of the

---

[8] TWA's service manual provided (I Supp. App. 18, in *In re Consolidated Proceedings, supra*):

> If a hostess becomes pregnant or adopts a child, she will be required to immediately resign from the Hostess Department. . . . Hostesses desiring to continue employment with the Company may request transfer to a ground position or may request a maternity leave.

American Airlines followed a similar practice. See *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960, 962 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

[9] See II J.A. 84.

[10] TWA, on August 5, 1975, stated as follows in answer to Plaintiffs' Fifth Set of Interrogatories:

> b. The Company refused to promote her to the purser classification because of her sex, and to hire females into that classification. Pursers receive higher compensation than hostesses doing substantially the same work and are segregated into separate seniority lists because of their sex.

Civil Rights Act of 1964 (I J.A. 4a).[11] The union (Air Lines Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO) brought the action against TWA on its own behalf and on behalf of five individuals representing a class of female flight cabin attendants then employed by TWA or employed by TWA at any time since July 2, 1965, and who had been or would desire to become pregnant (I J.A. 4a-6a).

The complaint alleged that since July 2, 1965, the effective date of the Act, TWA had engaged in unlawful employment practices by discharging female flight attendants who became pregnant and that TWA had refused in the course of collective bargaining to change its policy and practice (I J.A. 6a). The complaint asserted that the district court had jurisdiction under the Civil Rights Act of 1964, alleged that on June 1, 1970, the union had filed a charge with the Equal Employment Opportunity Commission and on July 31, 1970, had been notified by the EEOC of its right to sue; and sought a declaratory judgment, an injunction, back-pay and whatever additional relief was necessary in order to eliminate the effects of TWA's unlawful practices (I J.A. 4a, 7a-8a).

3. The answers to the complaints.

On September 30, 1970, TWA answered by admitting that the court had jurisdiction under Title VII of the Act but denying that TWA had engaged in unlawful employment practices (I J.A. 8a-12a). TWA alleged two affirmative defenses: that its "no-mothers" policy was a bona fide occupational qualification (42 U.S.C. §2000e-2(e) (1970)); and that the policy constituted a system measuring earnings by quantity and quality of production (42 U.S.C. §2000e-2(h) (1970)) (I J.A. 12a). TWA's answer did not raise lack of timeliness as a defense.

The answer of American Airlines, filed on the same day as TWA's, also admitted jurisdiction, denied that American

[11] The complaint against American Airlines is reprinted in I Supp. App. 1-6, in *In re Consolidated Pretrial Proceedings, supra.*

had violated the Act, offered the same affirmative defenses and raised no defense of lack of timely filing (I Supp. App. 12-16, in *In re Consolidated Pretrial Proceedings, supra*).

B. The Proposed 1971 Settlements Of The Cases

In October 1970, the union (ALSSA) and the defendant airlines renegotiated their collective bargaining agreements to allow currently-employed female flight attendants to remain in their jobs after becoming mothers and to permit those who left the company because of pregnancy on or after August 1, 1969, to return to active service as flight attendants (I J.A. 13a). The union and the airlines then entered into negotiations in an attempt to settle the cases.

On July 16, 1971, the parties filed proposed settlement agreements providing that any former hostess who was removed from the payroll between July 2, 1965, and July 31, 1969, because of pregnancy would be placed on a preferential hiring list if she gave timely written notice of her desire to return (I J.A. 25a).[12] The proposed agreements did not provide for back-pay or for an award of the seniority that would have accrued but for the airlines' "no-mothers" policy. At the request of the airlines and the union, the district court on the same day certified the class in the two cases as consisting of all former flight attendants who were removed from the payroll because of pregnancy between July 2, 1965, and July 31, 1969 (I J.A. 19a).

On August 5, 1971, prior to a scheduled hearing on the proposed settlements, the EEOC sought to intervene as of right in both suits. Upon the district court's denial of its motions, the EEOC appealed and the court of appeals issued a stay of all district court proceedings pending resolution of the appeals, which were consolidated. On January 18, 1972, the court of appeals affirmed, holding that the EEOC had no right to intervene despite its arguments that the class in both

[12] These proposed settlement agreements are reprinted in I Supp. App. 33-37 in *In re Consolidated Pretrial Proceedings, supra.*

cases was not adequately represented and that the proposed settlements were inadequate. *Air Lines Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 455 F.2d 101 (7th Cir. 1972).

In orders dated March 17, 1972, the district court approved the settlements for the members of the classes defined in its previous orders (I J.A. 54a-56a). The objections of some of the class members to the settlements resulted in the second opinion of the court of appeals in this litigation. *Air Lines Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (I J.A. 64a-78a). The court of appeals recognized that "All the stewardesses share the common question of whether the discharge-for-pregnancy policy was lawful." 490 F.2d at 643; I J.A. 76a. ALSSA, however, was found to be an inadequate representative of the class because of the inherent conflict of interest between the currently-employed flight attendants represented by the union and the discharged flight attendants on the issues of reinstatement and retroactive seniority. 490 F.2d at 640; I J.A. 70a-72a. The court of appeals therefore ruled that members of the class should be entitled to intervene in each case to replace ALSSA as the class representative and that the cases should proceed as class actions under Rule 23(b)(3), Fed. R. Civ. Pro. 490 F.2d at 643; I J.A. 77a.

C. Replacement Of The Union Class Representative

On remand, the district court appointed the three named petitioners in No. 78-1545 to replace the union in the TWA case as class representatives; redefined the class as all female flight attendants discharged by TWA on or after July 2, 1965, for reason of pregnancy; and formally consolidated the TWA and American Airlines cases (I J.A. 90a-92a, 96a-97a).

D. TWA's Attempt To Raise A "Statute Of Limitations" Defense

On September 16, 1974, TWA moved for leave to amend its 1970 answer by adding a "Third Affirmative Defense" that because plaintiffs and other members of the class failed to file charges with the EEOC within 180 days of the alleged unlawful practices "their claims are barred by the statute of limitations under section 706(e) of Title VII" (I J.A. 89a).[13] In an opinion and order dated November 20, 1974, the district court granted TWA's motion for leave to amend although in the court's view TWA's unexplained delay in pleading the statute of limitations defense "may well ultimately constitute a waiver of the defense" (I J.A. 101a). In so ruling, the court placed the burden on TWA of proving, through discovery or otherwise, that its delay in asserting the defense was excusable. *Ibid.*

Although the union in its Brief (at p. 14) emphasizes that TWA had been granted leave to amend, the union fails to point out that TWA characterized its "affirmative defense" as statute of limitations and that TWA has never filed an amended answer despite having received leave to do so in 1974.

---

[13] Although TWA cited the 180-day limitations period in Section 706(e), the provision in effect when the flight attendants were discharged (1965-1970) was the 90-day period in former Section 706(d) (42 U.S.C. §2000e-5(d) (1970)), which was amended to provide the 180-day period and renumbered in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §2000e-5(e)).

E. The District Court's Rulings That TWA Had Engaged In Unlawful Sex Discrimination Against *All* Class Members And That The Court Had Jurisdiction

1. The District Court's finding of illegal sex discrimination.

Contrary to statements in the Briefs of the union[14] and *amicus* AFL-CIO,[15] the district court specifically found that TWA and American Airlines, by discharging flight attendants pursuant to a "no-mothers" policy, had engaged in unlawful employment practices in violation of 42 U.S.C. §2000e-2(a) and that each member of the class, including those discharged before 1970, had been a victim of illegal sex discrimination (I J.A. 133a-134a). The district court therefore granted the plaintiff class's motion for summary judgment "on the issue of TWA's liability for violation of Title VII of the Civil Rights Act" (I J.A. 134a).[16]

2. The District Court's finding of jurisdiction.

On October 19, 1976, the date of its order granting summary judgment, the district court also entered an opinion and order denying TWA's motion to exclude certain members of the class for lack of subject matter jurisdiction (I J.A.

[14] *E.g.*, at pp. 29, 30, 37, 49.

[15] *E.g.*, at pp. 10, 11, 12, 14.

[16] In the American Airlines case, the district court, on April 28, 1976, granted summary judgment against the airline on the issue of liability, ruling that American's "no-mothers" policy violated Title VII (I J.A. 126a-129a).

On the same date, the district court ruled that ALSSA, Local 550, which had filed an opposition to the summary judgment motion, could no longer participate in the TWA and American Airlines cases because it had become defunct and had been succeeded by another local of the Transport Workers Union. III Supp. App. 113, in *In re Consolidated Pretrial Proceedings, supra*. The district court added that its order was without prejudice to the new union's moving to intervene. *Ibid.*

130a-132a).[17] The court held that TWA engaged in "continuing violations" with respect to female flight attendants discharged more than 90 days before they filed charges with the EEOC because their status as mothers prevented them from being rehired (I J.A. 130a-132a). The court thus concluded that it had jurisdiction over the claims of all class members *Ibid.*

F. The Decision Of The Court Of Appeals In No. 78-1545 That TWA Had Engaged In Illegal Sex Discrimination But That The District Court Lacked Jurisdiction Over The Claims Of Some Class Members

Upon TWA's interlocutory appeals of both orders,[18] the court of appeals reversed in part and ordered the case remanded (I J.A.136a).[19] The court first held that "TWA's no-motherhood policy . . . provides a clear example of sex

---

[17] When TWA first raised this issue, the district court stated to TWA's counsel, "Can I ask how in the world a motion like this can come five years after the filing of the case?" (I J.A. 103a).

[18] The district court amended these orders by entering an appropriate 28 U.S.C. §1292(b) order on December 16, 1976 (I J.A.135a). American Airlines also took an interlocutory appeal, but while its appeal was pending, American and the plaintiff class reached a settlement, which the district court approved. The terms of the settlement were basically the same as those in the later settlement with TWA and, as in the TWA case, the union (Association of Professional Flight Attendants) intervened and argued that the district court lacked jurisdiction because of the time limits in former section 706(d). The district court rejected the union's argument, ordered retroactive competitive seniority and the court of appeals affirmed upon the union's appeal. *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

[19] *In re Consolidated Pretrial Proceedings In the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978), certiorari granted, No. 78-1545, March 9, 1981.

discrimination prohibited by §2000e-2(a)." 582 F.2d at 1145.[20] In so holding, the court rejected TWA's defense that it lawfully discriminated on the basis of sex because its no-mothers policy was a bona fide occupational qualification reasonably necessary to TWA's business. 582 F.2d at 1145-1147. Accordingly, the appellate court affirmed the order granting summary judgment in favor of the class on the violation issue. I J.A. 136a.

In regard to TWA's motion to exclude class members, the court of appeals held that the 90-day filing requirement in former Section 706(d) was jurisdictional and not a statute of limitations, that TWA thus could not have waived it, and that the district court had no jurisdiction over the claims of those members of the class who were terminated more than 90 days before charges were filed with the EEOC. 582 F.2d at 1150-1152. However, as to the members of the class who became mothers between 1965 and 1970 and who accepted ground positions rather than leave employment, the court held that TWA was guilty of a continuing violation. 582 F.2d at 1149-1150. The district court therefore had jurisdiction over these members of the class and the members who were terminated during the 90 days preceding the filing of charges with the EEOC. 582 F.2d at 1150.

The court of appeals stayed its mandate and the plaintiff class filed a certiorari petition (No. 78-1545) raising the issue whether the 90-day limit was subject to waiver or estoppel. TWA cross-petitioned (No. 78-1549).[21] On June 4, 1979, this

[20] The court pointed out that the plaintiff class challenged only TWA's policy of requiring mothers to accept ground positions or resign, not the company's policy of requiring pregnant flight attendants to withdraw from flight duty. 582 F.2d at 1145.

[21] TWA's cross-petition raises four issues: (1) whether its no-motherhood policy violated Title VII; (2) whether plaintiff class was entitled to summary judgment on the ground that TWA's defense of bona fide occupational qualification raised no genuine issues of material fact; (3) whether any remedies should be prospective only; and (4) whether the court of appeals correctly held that TWA was

Court granted petitioners' joint motion to defer consideration of the certiorari petitions pending completion of settlement proceedings in the district court. Pet. App. No. 80-951, at 3a.

G. The 1979 Settlement Agreement

1. Designation of subclass A and subclass B.

At the suggestion of the plaintiff class and TWA, the district court on June 27, 1979, designated two subclasses in connection with a proposed settlement of the case (II J.A.2-4). Subclass A consisted of all former TWA flight attendants terminated pursuant to TWA's no-mothers policy on or after March 2, 1970, and those discharged between July 2, 1965, and March 2, 1970, who were reinstated in ground duty positions (*id.* at 3). There are approximately 30 persons in subclass A (II J.A.9). (With respect to the claims of these individuals, the court of appeals held that the district court had jurisdiction.) Subclass B consisted of all other TWA flight attendants terminated after July 2, 1965, pursuant to the same policy (*id.* at 3). There are approximately 400 persons in subclass B (*id.* at 9).

2. The Proposed Settlement Agreement and the Orders of the District Court.

The proposed settlement agreement dated June 18, 1979, is set forth in Pet. App. No. 80-951, at pp. 23a-37a. It provides that members of subclass A will receive a pro rata portion of $1.5 million and that members of subclass B will share $1.5 million (*id.* at 26a-27a).[22] Each class member who is "ready, willing and qualified" will be re-employed as a flight attendant after retraining (*id.* at 26a) and will be credited with

---

guilty of a continuing violation in regard to those class members who transferred to ground positions. Pet. for a Writ of Certiorari, No. 78-1549, at p. 2.

[22] The pro rata portion due each class member is to be determined by a formula that takes into account lost earnings (*id.* at 28a).

"company seniority" from the date of her termination, less the time during which she was pregnant (*id.* at 29a).[23]

The settlement agreement also provided that each re-employed class member would be credited with "full occupational (union) seniority" unless there was a timely objection by an interested party, in which event the issue of retroactive competitive seniority would be left for the court to decide in its discretion pursuant to Section 706(g) of Title VII, without TWA taking any position on the issue (*id.* at 29a). This portion of the agreement was amended to provide that the issue of accrued seniority was also to be decided by the court, with TWA remaining neutral. (*id.* at 21a).

Upon being notified of the proposed settlement, the Independent Federation of Flight Attendants (IFFA), which in April 1977 became the third collective bargaining agent for TWA's flight attendants since 1970, intervened (II J.A.11). While TWA stood aside, the plaintiff class and IFFA called witnesses, presented documentary evidence, submitted briefs and presented oral argument on the issue of retroactive competitive seniority (II J.A.15-190). The evidence showed that TWA employed 6,963 flight attendants and that the largest potential number of returning subclass B members was 172 (II J.A.137-138).[24] Under the terms of the settlement agreement, re-employment of the returning class members would occur only as vacancies arose, "provided that no flight attendant having greater seniority desires to fill such vacancy" (Pet.

[23] Any class member who does not become re-employed will receive twelve trip passes "for use at any time or times during her lifetime" (*id.* at 32a).

[24] The *potential* number of returning members of subclass A was set at 33 (II J.A.137). As will appear below, IFFA does not challenge the grant of retroactive seniority to subclass A members; its arguments on the two issues presented in its petition for certiorari specifically exclude subclass A. See Pet. for a Writ of Certiorari, No. 80-951, at pp. 9 n. 11, 19 n. 15; and this Court's order dismissing the writ in regard to the third issue presented in the union's Petition. II J.A.213.

App. No. 80-951, at 34a). No incumbent flight attendant would lose his or her job as a result of the settlement and testimony at the hearing indicated that "providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers in less than half a year" (Pet. App. No. 80-951, at 10a).

After considering the evidence, the district court issued two orders, one approving the settlement and dismissing the action and another awarding retroactive competitive seniority to those members of the class who become re-employed (Pet. App. No. 80-951, at 16a-19a). With respect to the award of retroactive seniority, the court found that this would "not have an unusual adverse impact upon currently employed flight attendants" (*id.* at 18a-19a).

Because the union appealed both orders of the district court, TWA refused to implement the settlement agreement. The agreement provided that the "Final Order Date," which triggered implementation, would be the date on which the district court's order implementing the settlement was no longer subject to judicial review (*id.* at 25a, 36a). The settlement agreement provided further that on the "Final Order Date," the plaintiff class and TWA would dismiss their certiorari petitions pending in this Court (*id.* at 35a).

H. The Decision Of The Court Of Appeals Sustaining The District Court's Orders

On appeal, IFFA argued that the district court lacked jurisdiction to approve the settlement and to order retroactive seniority with respect to subclass B (Pet. App. No. 80-951, at 5a). Relying on its earlier opinion in regard to a similar settlement in the American Airlines case,[25] the court of appeals held that the uncertainty of the jurisdictional issue, which was still open in light of the pending certiorari petition in No.

---

[25] See note 18 *supra*.

78-1545 and its stay of the mandate, the facts that the courts of appeals were split on the issue and that the Supreme Court had not yet decided it, and the principles favoring settlement of Title VII cases, led to the conclusion that the parties should not be forced to litigate further the jurisdictional issue (*id.* at 9a). As to whether the settlement was fair and reasonable, the court held that "the settlement serves the public policy of remedying past acts of sex discrimination" (*id.* at 9a) and that there would be no unusual adverse impact from the award of retroactive seniority in view of the fact that the returning members of the class would comprise, at most, only three percent of the flight attendants employed by TWA (*id.* at 9a-10a).

SUMMARY OF ARGUMENT

I.

Contrary to the union's contentions, TWA did not bargain away seniority rights of incumbent employees in reaching a settlement with plaintiffs. The union's objection here is aimed not at the settlement agreement, but at the separate court order awarding seniority after a hearing between the union and the class. Moreover, in this Court the union cannot object to the seniority awarded to all members of the class; it is confined to protesting only the award to the members of subclass B. The district court's orders upholding jurisdiction over the claims of all class members and finding that each member had been the victim of a Title VII violation were still in effect despite the ruling of the court of appeals. TWA's appeals were interlocutory and the court of appeals had stayed its mandate after holding that the claims of subclass B members were jurisdictionally defective. Thus, at the time of settlement, there were outstanding findings of jurisdiction and violation. The question of remedy remained. The settlement agreement did not confer jurisdiction on a court that had already found it had jurisdiction. The only position the union can take is that the district court should have been persuaded by the not-yet-effective decision of the

court of appeals about the meaning of former Section 706(d). Since the court of appeals misconstrued that provision, the district court correctly proceeded to order the remedy of retroactive seniority.

II.

Former Section 706(d) is not a jurisdictional requirement but is a statute of limitations subject to waiver and estoppel. It is written in the standard language of a statute of limitations and the relevant legislative history shows conclusively that Congress intended it to be treated as such. This Title VII provision was modeled after the comparable timely-filing provision in the National Labor Relations Act, which Congress and the courts have considered a statute of limitations, not a jurisdictional requirement. The prior decisions of this Court in Title VII cases are firmly against treating the time limit involved here as jurisdictional. The Court has held that the timely-filing requirement has the same function and purpose as a statute of limitations, that there is no necessity for each class member to comply with it in order to have their claims adjudicated and that Congress may constitutionally expand the Title VII time limits and apply them retroactively because the running of a statute of limitations does not extinguish the underlying claim.

Although we believe that TWA's failure to raise noncomplaince with the time-limit as an affirmative defense and its earlier attempt to bind the members of subclass B to an improper settlement with the union resulted in TWA's relinquishment of the defense of statute of limitations, that is not at issue here in light of the settlement between the class and TWA. If, as we contend, former Section 706(d) was not jurisdictional, the union's various arguments against the seniority award to the members of subclass B must be rejected.

III.

Regardless of how this Court eventually construes former Section 706(d), the district court properly approved the settlement agreement and awarded retroactive competitive seniority. The union's arguments against the district court's order — that the court had no jurisdiction to act and that the members of subclass B were not victims of unlawful sex discrimination — depend on the proper construction of former Section 706(d), which we have already addressed. That was an open question in 1979, as it is today. Such uncertainty in litigation, which in this case was uncertainty over how this Court would rule, is one of the main reasons why parties settle their disputes. In Title VII cases, there is a strong Congressional policy in favor of settlement. The fact that issues raised by TWA's interlocutory appeal remained unresolved in 1979 did not give the union the sole right to determine what remedy was appropriate for the members of subclass B. The settlement agreement and the seniority order came in the wake of district court findings of jurisdiction and Title VII violations. Regardless of what the situation may be in some other case, the circumstances here were the same as if TWA had never sought interlocutory review and merely ended its dispute in view of the rulings against it. There is no reason why an employer should be forced to continue to litigate after it has been found in violation of Title VII. At the remedy stage, the union may intervene in an attempt to show that retroactive competitive seniority is not necessary to redress the employer's violations. The union in this case was given that opportunity and since the appropriateness of the seniority award is not an issue before the Court, the judgment of the court of appeals in No. 80-951 should be affirmed.

ARGUMENT

I.

THE UNION'S ARGUMENTS MISCONCEIVE THE NATURE OF THIS CASE

Throughout its Brief, the union persists in arguing about matters that bear no resemblance to the case actually before the Court. Time and again we are told that TWA "bargained away" the competitive seniority rights of incumbents, that the plaintiff class and TWA reached a settlement conferring such seniority rights on members of the class over the union's objection, that the district court ordered that the settlement supersede the collective bargaining agreement and that the union never agreed to the "portion of the 'settlement'" granting retroactive competitive seniority. There is scarcely a page of the union's Brief that does not contain such assertions. In the margin we quote but a few examples and provide citations to others.[26]

[26] Union Brief, at p. 16 (TWA "cannot diminish its own potential monetary liability by granting to Plaintiffs competitive status seniority inconsistent iwth [sic] the TWA-IFFA contract"); *id.* at 17 ("by forcing the settlement on IFFA and depriving it of its contractual rights"); *id.* at 18 ("the judgment below . . . permitted Defendant TWA to bargain away to the Plaintiffs rights which TWA did not own, namely, the competitive seniority rights of its incumbent flight attendants"); *id.* at 20 (TWA would "nullify" competitive seniority rights "in order to 'settle' the Plaintiffs' claims against it"); *id.* at 22 (the district court did not have authority to enter a "judgment at TWA's behest" granting retroactive competitive seniority); *id.* at 23 ("IFFA was entitled to reversal of so much of the proposed 'settlement' between TWA and Plaintiffs as would undermine" the portion of the collective bargaining agreement concerning competitive seniority); *id.* at 24 ("The courts below overrode the competitive status seniority provisions of the TWA-IFFA contract on the basis that it was a fair 'settlement.' But IFFA never agreed to, and in fact seriously objected to that portion of the 'settlement' ").

See, for additional examples, *id.* at 4, 5, 10, 11, 21, 26, 33, 34, 35 n.20, 36, 37, 38, 41, 42, 43, 50.

Whatever case the union has in mind, it is not this one. The union's objection here, and its only objection, is to conferring retroactive competitive seniority on returning members of the class — but that is not part of the settlement agreement approved by the district court. The union, in its intervention petition in the district court and in its Brief in this Court, disclaimed any interest in TWA's monetary award to the class or in its agreement conferring full company seniority on returning class members,[27] which is what the settlement agreement accomplishes. The grant of retroactive competitive seniority, however, is not part of the settlement agreement but is contained in a separate order entered by the district court (Pet. App. No. 80-951, at 18a-19a). Indeed, the settlement agreement specifically provided that TWA would remain neutral on this issue while the plaintiff class and the union litigated the question, a question that, according to the terms of the agreement, "will be determined by the Court in its discretion" (*id.* at 29a; see also *id.* at 21a). That is, in fact, what occurred when the district court entered its seniority order after full briefing, argument and an evidentiary hearing in which the union and the plaintiff class called witnesses and presented documentary evidence (see *id.* at 18a; II J.A.26-190).

While the union's objection is thus aimed at the district court's seniority order, not the order approving the settlement agreement or anything TWA "bargained away," the union's actual protest is even narrower than its Brief may lead the Court to believe. The only issues before the Court in No. 80-951 are the first two questions presented in the union's certiorari petition,[28] which concern the district court's supposed lack of authority to order retroactive seniority when there is neither subject matter jurisdiction (Question 1) nor a finding of a violation of Title VII (Question 2). The union itself has expressly restricted (as it must) its arguments on both issues to

---

[27] See, *e.g.*, Union Brief, at pp. 4, 5, 16, 22, 43; II J.A.13.

[28] See this Court's Order of May 18, 1981 (II J.A. 212-213).

the members of subclass B,[29] only 172 of whom, at most, would be returning to the 7000-member bargaining unit (see p. 13 *supra*.)[30]

The union's Brief generates confusion about another important aspect of the case. The union states that "Without the settlement agreement, the [district] court would not have had any power to determine seniority" (Brief, at p. 41). This statement, which is the premise of much of the union's argument, is incorrect: *regardless of the settlement agreement, the district court quite clearly had jurisdiction to enter the seniority order at the time it did so.* To understand why this is so, one must consider the procedural posture of the case.

On October 19, 1976, the district court entered two orders, one holding that there was jurisdiction over all members of the plaintiff class[31] and the other granting partial summary judgment to the entire class on the issue whether TWA had engaged in unlawful sex discrimination in violation of Section 706(g) of the Act (I J.A.130a, 133a). Despite the union's statements to the contrary, the record could not be clearer that the district court found that TWA had unlawfully discriminated against *all* members of the class — those in subclass A and those in subclass B — by discharging them

---

[29] See Petition for a Writ of Certiorari, No. 80-951. In discussing the first question presented, which concerns "jurisdiction," the union admitted "Our jurisdictional challenge, of course, relates only to Sub-Class B." *Id.* at 9 n. 11. In discussing the second question presented, which concerned the district court's power to award retroactive seniority "absent a finding of a violation," the union conceded "Our arguments here apply only to Sub-Class B." *Id.* at 19 n. 15. See also the union's Brief, at pp. 41-42, 49-50.

[30] With respect to the third question presented in the union's certiorari petition — whether the award of retroactive seniority was appropriate in light of the impact on incumbents — the Court dismissed the writ as improvidently granted (IIJ.A.213).

[31] At the time, the class was not split into subclass A and subclass B.

when they became mothers.[32] The district court's orders were, of course, interlocutory: having found a violation, the question of remedy remained to be decided.

TWA appealed both interlocutory orders to the court of appeals pursuant to 28 U.S.C. § 1292(b),[33] which expressly provides that a stay will occur only upon court order.[34] Neither the district court nor the court of appeals issued an order to stay the district court proceedings. The court of appeals affirmed the district court's ruling that TWA had violated Title VII but held that the 90-day filing requirement in former Section 706(d) could not be waived and that the claims of some class members were therefore barred.[35] However, the court of appeals stayed its mandate[36] and the plaintiff class and TWA filed certiorari petitions.

Thus, when the district court entered its seniority order on November 8, 1979, it did so on the basis that its previous orders finding jurisdiction and unlawful discrimination were still outstanding, that its proceedings had not been stayed and that no mandate had issued from the court of appeals. In these circumstances, the district court's power to grant relief

---

[32] The union states that, with respect to the plaintiff class, there has been no "finding that they have been victims of a violation of Title VII" (Brief, at p. 29); that in "this case, of course, no acts of discrimination have been 'proved' " (*id.* at 30); that "TWA has specifically not admitted to any unlawful conduct, and hence the conduct must be treated as lawful" (*id.* at 49); and that "there has been neither the finding or admission of a discriminatory act" in this case (*ibid.*) The AFL-CIO, in its *amicus* Brief, commits the same mistake. See note 38 *infra*.

[33] See p. 10 *supra*.

[34] See also Fed. R. Civ. Pro. 62; Fed. R. App. Pro. 8(a); *Reed* v. *Rhodes*, 549 F.2d 1046, 549 F.2d 1050 (6th Cir. 1976); *O'Brien* v. *AVCO Corp.*, 309 F. Supp. 703, 705 (S.D.N.Y. 1965).

[35] Pet. App. No. 78-1545, at A1-A17.

[36] See Pet. App. No. 80-951, at 3a (court of appeals opinion); *id.* at 14a-15a (district court order).

under Section 706(g) did not depend on the settlement agreement. The district court quite clearly had jurisdiction to order retroactive competitive seniority for those flight attendants found by the court to have been victims of unlawful sex discrimination — namely, all members of the plaintiff class."

In sum, the issue here is *not* whether a district court can order retroactive competitive seniority without first finding unlawful discrimination. In this case, the district court made such a finding." The issue is *not* whether a district court can

---

" The district court so held, stating that "Contrary to the Union's assertion, the filing of the *Consolidated* opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members." Pet. App. No. 80-951, at p. 15a (Order of September 14, 1979).

In the face of the procedural history described in the text and the foregoing Order, it is difficult to understand how the Union can assert in its Brief (at p. 38) "The District Court did not say whether it thought jurisdiction existed" and (somewhat inconsistently) that the district court "held that the policies favoring settlement allow a court to act despite a finding of a lack of subject matter jurisdiction" (*id.* at 37).

" The Brief of the AFL-CIO as *amicus curiae* is irrelevant to this case. It proceeds from an incorrect factual premise (AFL-CIO Brief, at p. 10), erroneously stating:

> No violation of Title VII has been found by the lower courts. There is only plaintiffs' allegation of such a violation. In the settlement agreement, the Company "expressly disclaims any liability in these lawsuits***." Pet. App. 25a. And, the only court ruling on the validity of plaintiffs' allegation is the holding of the court of appeals that the Title VII claims of the vast majority of those in the plaintiff class — all of whom under the court order at issue would be granted extra-contractual seniority — are time-barred. Pet. App. 40a-58a.

The AFL-CIO further contends that before a court may order retroactive competitive seniority, plaintiffs must prove their claims of unlawful discrimination (*id.* at 13; see also *id.* at 11). Plaintiffs in this case did just that, which is why the district court entered the order granting summary judgment in their favor on the violation issue — a finding of which the AFL-CIO is apparently unaware.

order such relief despite holding that it had no subject matter jurisdiction. When the district court granted retroactive seniority in 1979, the court's 1976 order that it had jurisdiction over the claims of all members of the class was still in effect. The issue is *not* whether an employer can "bargain away" seniority rights of incumbent employees over the union's objection. Retroactive seniority was not bargained away by TWA in the settlement agreement; it was awarded by the court because the plaintiff class prevailed in an evidentiary hearing with the union.

The only position left open to the union is one it has not expressly taken in this Court — namely, that the district court, when presented with the proposed settlement agreement and the separate question whether to order retroactive competitive seniority in 1979, should have reversed its prior finding of jurisdiction in anticipation of a denial of the class's certiorari petition (No. 78-1545) or this Court's affirmance of the 1978 ruling of the court of appeals after granting the writ. This was the union's argument in the district court (II J.A. 15-21; Tr. of July 31, 1979, at pp. 37-44, 64-69) and we have two responses. First, the court of appeals' jurisdictional ruling was in error[39] and the district court therefore properly refused to be persuaded by it. If we are correct about this, the Court need proceed no further in disposing of this case,[40] as the union concedes.[41] Second, regardless of how the Court in-

---

[39] This is the issue presented in No. 78-1545. The union argues in support of the court of appeals; the AFL-CIO, as *amicus curiae*, takes no position on this question.

[40] A remaining issue might be whether the remedy of retroactive competitive seniority was otherwise appropriate. But this is the third question presented in the petition in No. 80-951 and is the question on which the Court dismissed the writ as improvidently granted (II J.A. 213).

[41] See the union's Brief, at p. 43 ("Indeed, if the parties had not used the settlement agreement to confer jurisdiction for the purposes of a seniority grant, there would have been no one objecting to the court's actions."). As we later discuss (pp. 36-37 *infra*) the agreement had no such effect.

terprets the 90-day filing rule in former Section 706(d), the issue was sufficiently in doubt in 1979 when the class and TWA entered into the settlement that the parties could agree to end their dispute, leaving to the district court's discretion whether to order retroactive seniority in light of its outstanding orders that there was jurisdiction and that all members of the class were victims of unlawful sex discrimination.

II

THE TIMELY FILING OF CHARGES WITH THE EEOC PURSUANT TO FORMER SECTION 706(d) IS NOT A JURISDICTIONAL REQUIREMENT

In discussing why the 90-day filing requirement of former Section 706(d) — now 180 days under Section 706(e)[42] — is subject to the equitable doctrines of waiver and estoppel, we follow a path clearly marked by the thorough analysis in *Coke* v. *General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (*en banc*), which twenty-three of the judges of that court joined.[43] *Coke* held that Title VII's requirement that an aggrieved person file a claim with the EEOC within 180 days of the alleged discriminatory act is not, in a subsequent federal civil action, a jurisdictional requirement[44] but is in the nature of a statute of limitations subject to equitable tolling.[45]

---

[42] See note 13, *supra*.

[43] The remaining two judges concurred in the result. 640 F.2d at 596.

[44] We use the phrase "jurisdictional requirement" to mean a requirement that, if not met, deprives the court of subject matter jurisdiction, that may be raised by any party or the court at any stage of the litigation and that is not subject to the equitable doctrines of waiver and estoppel.

[45] Although the actual issue in *Coke* concerned the comparable 180 day time period in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(d)(1), the court of appeals reached its result on the basis of its analysis of the 180-day filing requirement in Title VII. The union agrees in its Brief (at p. 41, n. 23) in this Court with our statement in the text about the holding of *Coke*,

In so holding, *Coke* overruled the decision in *McArthur* v. *Southern Airways*, 569 F.2d 276 (5th Cir. 1978), which had set aside a settlement agreement on the basis that there was no jurisdiction over the claims of the class members because they had not complied with the 180-day limit of Section 706(e).[46] 640 F.2d at 596; *Oaxaca* v. *Roscoe*, *supra*, 641 F.2d at 388.

In reaching its decision, the court of appeals in *Coke* reviewed the relevant decisions of all the circuits and found that the Seventh Circuit, as a result of its 1978 opinion in this case (*In re Consolidated Pretrial Proceedings In the Airline Cases, supra*) is the only court of appeals currently holding that unless the charge filed with the EEOC is timely, a court in a later civil action has no subject matter jurisdiction. 640 F.2d at 590-591.[47]

As *Coke* pointed out, even the Seventh Circuit may be retreating from this position[48] — and for good reason. It

---

which the Fifth Circuit confirmed in *Oaxaca* v. *Roscoe*, 641 F.2d 386 (5th Cir. 1981).

[46] The union had argued that *McArthur* was indistinguishable from this case. Petition for a Writ of Certiorari, No. 80-951, at p. 15.

[47] *Coke* cited decisions from the courts of appeals for the Second, Third, Sixth, Eighth, Ninth, Tenth and District of Columbia Circuits holding or indicating that the timely-filing rule is not a jurisdictional requirement. *Ibid.*; see also the post-*Coke* opinions in *Pierce* v. *County of Oakland*, _____ F.2d _____ (6th Cir., slip op. No. 79-1684, July 2, 1981); *Carlile* v. *Smith Routt School District*, _____ F.2d _____ (10th Cir., slip op. No. 80-1330, July 6, 1981). Cf. *Heymann* v. *Tetra Plastics Corp.*, 640 F.2d 115 (8th Cir. 1981), decided shortly before *Coke* and not cited in *Coke*, which uses the word "jurisdiction" but analyses the 180-day requirement in the terms of a statute of limitations.

[48] 640 F.2d at 590 n. 11, citing *Movement for Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235, 1241 (7th Cir. 1980).

Coke also observed that on the same day in 1978 that the court of appeals rendered its opinion in this Title VII case, it decided that

would be strange indeed if Congress had intended the 90-day rule to be treated as a jurisdictional requirement rather than a statute of limitations. Former Section 706(d) was not even framed in jurisdictional terms. It read "A charge under this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ." This is language typical of statutes of limitations.[49] In a separate subsection, Congress addressed the jurisdiction of federal courts over civil actions, as distinguished from "charges" filed with the EEOC. The jurisdictional provision of Title VII states now, as it did in 1970, "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this sub-chapter."[50] There is nothing in this provision that makes an exception to the courts' jurisdiction for "charges" filed with the EEOC beyond the 90-day limit. So long as the subject matter of the suit arises under Title VII, the district courts have subject matter jurisdiction. From all that appears on the face of Title VII, the legislation follows the common statutory form of defining the jurisdiction in one section and providing a statute of limitations in another.

While the legislative history of the 90-day rule in former Section 706(d) is sparse,[51] it too suggests that Congress considered the provision to be a statute of limitations.[52]

---

the comparable ADEA 180-day filing rule was not a jurisdictional requirement. *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978). See note 57 *infra*.

[49] See Note, *Developments in the Law — Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1186 (1950).

[50] 42 U.S.C. §2000e-5 (f)(3).

[51] See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 820 (1980).

[52] Senator Humphrey, comparing H.R. 7152 and the Senate bill, S. 656, which the Senate passed, referred to its 90-day time period as a "period of limitation." 110 Cong. Rec. 12723 (1964). Senator Case, one of the Senate floor managers of the House bill, stated that the purpose of the time period was to prevent the pressing of

Moreover, when the 90-day period was extended to 180 days in 1972, Congress firmly indicated that the time limit was to be treated merely as a period of limitations, not a jurisdictional absolute.[13] The Senate Labor Committee's Section-by-Section Analysis stated:

> Section 706(e) — This subsection prescribes the time limits for the filing of a charge. . . . This subsection would permit charges to be filed within 180 days of the alleged unlawful practice — a limitation period similar to that contained in the Labor-Management Relations Act, as amended (29 U.S.C. § 160(b)).

S. Rep. No. 415, 92d Cong., 2d Sess. 36-37 (1971). The Minority View of the House Labor Committee's Report (H.R. Rep. No. 238, 92d Cong., 2d Sess. 65-66 (1971)), also referred to the filing period as a "statute of limitations," supported the extension to 180 days and observed that "this is identical to the statute of limitations under the National Labor Relations Act. . . ."

The analogy between the timely-filing provision for unlawful employment practice charges under Title VII and for

---

"stale" claims (110 Cong. Rec. 7243 (1964)), "an end usually associated with a statute of limitations." *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 593. See *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L. J. 811, 847 (1979).

[13] We can perceive no basis for interpreting the 90-day rule in effect until 1972 differently than the 180-day rule in effect since then. We therefore believe it appropriate to seek guidance from the legislative history surrounding the 1972 amendment although only the pre-1972 version of the timely-filing provision is actually involved in this case. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n. 7 (1979); and *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980), cited in *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 594.

unfair labor practice charges under the NLRA[34] is particularly significant because the courts of appeals have uniformly held that the NLRA provision is a statute of limitations subject to recognized equitable doctrines, not a restriction on the jurisdiction of the National Labor Relations Board.[35] Even in the absence of the kind of specific legislative history we have here, this Court has interpreted the original and amended versions of Title VII by relying on cases decided under the NLRA, which was "the model for Title VII's remedial provisions. . . ."[36] The 1972 legislative history thus serves to confirm what this Court's decisions would, in any event, have dictated — that the pre-1972 timely filing requirement at issue here, like the 180-day provision currently in effect, is to be treated as a statute of limitations, as is its counterpart in the NLRA.[37]

---

[34] Section 160(b) of the National Labor Realtions Act, 29 U.S.C. §160(b), provides in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."

[35] See, in addition to *Laffey* v. *Northwest Airlines, Inc.*, *supra*, 567 F.2d at 475 n.351, and the cases there cited. *A. H. Belo Corp.* v. *NLRB*, 411 F.2d 959 (5th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970).

[36] *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 366 (1977). See also *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979); *Franks* v. *Bowman Transportation Co., Inc.* 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11, 420 & n.12 (1975).

[37] Although further evidence of Congress' intent may be unnecessary, there is more. In *Coke*, the court of appeals quoted the Final Conference Committee Section-By-Section Analysis of the 1972 amendments to Title VII, 118 Cong. Rec. 7166, 7167 (1972), which characterized the filing period as a "time limitation." 640 F.2d at 593-594. See also Jackson & Matheson, *supra*, 67 Geo. L. J. at 845-846.

Moreover, with respect to the 180-day filing requirement in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §626(d)(1), which was modeled after Title VII (see *Oscar Mayer &*

As against this, the union cites four opinions of this Court, using the term "jurisdictional" or "jurisdiction" in reference to the timely-filing requirement.[58] In one of these opinions, however, the Court also characterized the time limit rule as a "limitations period"[59] and in another the Court also referred to it as a period of "limitations."[60] Moreover, the union fails to point out that in every case decided after those it cites, the Court has used "the limitations label to the exclusion of the jurisdictional label" in referring to the timely-filing requirement.[61]

Co. v. *Evans*, 441 U.S. 750 (1979); *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 587)), Congress made clear when it amended Section 626(d)(1) in 1978 that the timely filing requirement "is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978), quoted in *Coke*, *supra*, 640 F.2d at 594.

[58] See union Brief, at p. 45, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973), where the phrase "jurisdictional prerequisite" first appeared; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), which cited *McDonnell Douglas* when it used the phrase; and *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976), which relied on *Alexander*; and the footnote in *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 557 n.9 (1977).

[59] See *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 240 & n.14.

[60] *United Airlines, Inc.* v. *Evans*, *supra*, 431 U.S. at 560. Justice Marshall, joined by Justice Brennan, dissenting, stated that the only question in the case was whether the complaint was barred by the "statute of limitations" in Section 706(e). 431 U.S. at 561.

[61] *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 588, citing *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371-372 (1977) ("statute of limitations"); *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385, 391-392 (1977); *Mohasco Corp.* v. *Silver*, *supra*, 447 U.S. at 818-822; *Delaware State College* v. *Ricks*, _____ U.S. _____, 101 S. Ct. 498 (1980).

Still more important, the relevant decisions of this Court are inconsistent with the union's argument that the timely-filing provision is a jurisdictional absolute.[62] In *Delaware State College* v. *Ricks, supra*, 101 S.Ct. at 503, the Court held that the 180-day time limit for filing charges with the EEOC and the state statute of limitations there involved had the same function and purpose:

> The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.

Since, as *Ricks* holds, this timely-filing requirement in Title VII is for the protection of employers,[63] unless the employer raises it as an affirmative defense in answer to a Title VII suit there is no reason for a court to consider it (see Rule 8(c), Fed. Rules Civ. Pro.) This is why in *Mohasco Corp.* v. *Silver, supra*, the Court noted that "the plaintiff had missed a related Title VII time provision by one day" but "rather than dismissing the action sua sponte, which the Court surely would have done if it considered the requirement to be a mat-

---

[62] The union suggests that the 90-day rule might be both a statute of limitations and jurisdictional. Brief, at p. 45. This is, of course, a contradiction in the union's terms. Regardless of labels, the issue is whether the timely-filing requirement is subject to waiver and estoppel. The union uses "jurisdiction" to mean non-waivable (Brief, at p. 40) and "statute of limitations" to mean an affirmative defense that may be waived (*id.* at 49 n.30). The union's suggestion that the 90-day rule can be both leads to the odd conclusion that it is both unwaivable and waivable.

We add one caveat. As we discuss later, in other contexts the Court has labelled some requirements "jurisdictional" but subject to waiver; so far as we are aware, however, it has never held that a statute of limitations may not be waived.

[63] See *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 428 (1965) (such time limits are "primarily designed to assure fairness to defendants").

ter of subject matter jurisdiction,"[64] the Court merely stated in a footnote (447 U.S. at 811 n.9):

> Petitioner did not assert respondent's failure to file the action within 90 days as a defense.

Furthermore, if the timely filing of a charge with the EEOC is a jurisdictional requirement, as the union contends, "then each class member should be required to file a claim before participating in a Title VII class action, just as each class member must satisfy the jurisdictional amount in other class actions."[65] But the Court had held that not all class members in a Title VII class action need file a charge with the EEOC, let alone a timely charge.[66] As a result, the Court ruled in *United Airlines, Inc.* v. *McDonald, supra*, that the respondent-stewardess could intervene after judgment to appeal the district court's refusal of class certification in a Title VII action challenging the airline's "no-marriage" policy. Before intervening, the stewardess had not filed a timely charge with the EEOC. 432 U.S. at 389-390. Although the union's argument here would have required rejection of her claim because there was no subject matter jurisdiction, the Court analyzed the case on the basis that the Title VII time limits were "statutes of limitations."[67] Since the stewardess sought review of the denial of the class action status, "[s]uccess in that review would result in the certification of a class,

---

[64] *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 589.

[65] *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 589, citing *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969).

[66] See *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 414 n.8 (1975); *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 771; *United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 389 n.6.

[67] Both the 180-day limit for filing charges with the EEOC and the requirement that a civil action be filed within 90 days of receipt of a right-to-sue letter from the EEOC were involved. 432 U.S. at ____ n.11.

the named members of which had complied with the statute of limitations [Section 706(e)]; the respondent is a member of that class against whom the statute had not run at the time the class action was commenced." 432 U.S. at 392.[48]

The Court's decision in *Electrical Workers* v. *Robins & Myers, Inc., supra,* is also contrary to the union's jurisdictional argument, as *Coke* and other courts of appeals' opinions have pointed out.[49] In holding that it was constitutional for Congress' 1972 extension of the 90-day rule to 180 days to be applied retroactively, the Court quoted from and relied on *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315-316 (1945), which held that under the Fourteenth Amendment, Congress is permitted to lift "the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time. . . ." 429 U.S. at 243-244. The holding of *Chase*, on which the Court rested its decision in *Robbins & Myers*, was that statutes of limitations concern matters of remedy and do not erase the underlying claim. 325 U.S. at 314-316.

Thus, the language of former Section 706(d) and of Title VII, the legislative history of the original and amended provision, the comparable timely-filing requirements in similar legislation, the purpose of the provision and the relevant holdings of this Court lead to but one conclusion — that the 90-day requirement is in the nature of a statute of limitations subject to waiver and estoppel. There are no contrary indications. The fact that on several earlier occasions the Court in

[48] The dissenting opinion of Justice Powell, in which the Chief Justice and Justice White joined, also analyzed the Title VII timely-filing requirement in terms of a "statute of limitations," but reached a different result in light of the strong policy favoring settlements in Title VII cases. 432 U.S. at 396. In support of this policy, Justice Powell cited the Seventh Circuit's affirmance of the settlement and seniority award in the American Airlines case that had been consolidated with this case. *Id.* at 401; see note 18 *supra.*

[49] In addition to *Coke* (640 F.2d at 588), see *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 108-109 (2d Cir. 1978); *Hart* v. *J. T. Baker Chemical Co.*, 598 F.2d 829, 833 (3d Cir. 1979).

dictum used the term "jurisdictional" when it referred to the requirement of timely filing with the EEOC (see p. 28 *supra)* lends nothing to the union's position. The Court has spoken of the "jurisdictional" requirement of exhaustion of administrative remedies under other statutes, but has held that this requirement may be waived or even disregarded in certain circumstances.[70]

What the union seeks through its characterization of former Section 706(d) as "jurisdictional" is the advantage of the maxim that any party, or the court on its own motion, may raise a question of jurisdiction over the subject matter at any stage of the litigation. Yet, "[a]s many commentators have noted. . .this fetish of federal jurisdiction is wholly inconsistent with sound judicial administration and can only serve to diminish respect for a system that tolerates it."[71]

---

[70] Only last Term, the Court in *Schweiker* v. *Wilson*, _____ U.S. _____, 101 S. Ct. 1074 (1981), a Social Security Act case, noted that the district court had dismissed the complaints "for lack of subject matter jurisdiction on the ground that the plaintiffs had failed to exhaust" their administrative remedies but that the court of appeals reversed, "holding that the Secretary had waived any requirement of exhaustion. . . ." 101 S. Ct. at 1079. See also *Weinberger* v. *Salfi*, 422 U.S. 749, 764-765 (1975).

[71] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 366 (1969). The ALI concluded that it was consistent with Article III of the Constitution to foreclose the raising of jurisdictional questions after the pleadings had closed and that it was "necessary and proper" to "require issues of jurisdiction to be timely raised, and to prevent their use to take unfair advantage of opposing parties or to impede the administration of justice." *Id.* at 368.

Some courts have found it intolerable to allow a party first to submit to the court's jurisdiction for the purpose of trying to gain an advantage and then to take the inconsistent position of opposing jurisdiction when the advantage is no longer available. See, *e.g.*, *Alger* v. *Hayes*, 452 F.2d 841, 844-845 (8th Cir. 1972), holding that the defendant was estopped from asserting lack of jurisdiction. TWA's incumbent flight attendants are in the same position as the

Why Congress would have intended to perpetuate such a "fetish" in "a scheme in which laymen, unasssisted by trained lawyers initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972)), the union does not explain.[72] Why Congress would have intended such a result when timely-filing provisions in other similar legislation are treated as waivable statutes of limitation the union cannot explain.[73].

In this case, TWA did not raise failure to comply with former Section 706(d) as a defense.[74] When it sought leave to amend its answer four years after the complaint had been filed, the district court expressed considerable doubt that TWA could overcome the plaintiff class' argument that TWA had

---

defendant in that case, having first invoked the court's jurisdiction through their collective bargaining representative and then, nine years later, having opposed settlement of the case on jurisdictional grounds.

[72] It is, we submit, incredible to suppose that although in Title VII "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims," *Carson* v. *American Brands, Inc.*, _____ U.S. _____, 101 S. Ct. 993, 998 n.14 (1981), Congress intended to prevent employers from waiving the timely-filing requirement while they seek to settle with their aggrieved employees. Yet that is where the union's argument leads.

[73] In addition to time limits in the ADEA and NLRA, which we have previously discussed, see, *e.g.*, the 60-day period of limitations in the Social Security Act, 42 U.S.C. 405(g), which this Court has found to be a waivable statute of limitations (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764; *Matthews* v. *Eldridge*, 424 U.S. 319, 328 n.9 (1976)); and the three-year timely-filing requirement in the Federal Employers' Liability Act, 45 U.S.C. §56, construed in *Burnett* v. *New York Central R. Co.*, *supra*.

[74] "Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 Wright & Miller, *Federal Practice and Procedure* §1278, at p. 339 (1969). Statute of limitations is an affirmative defense under Rule 8(c), Fed. Rules Civ. Pro.

waived this defense (I J.A. 101a); thereafter, TWA never filed an amended answer. Moreover, in 1971 TWA had sought to have the class certified to include those members who had not filed timely charges with the EEOC. TWA did this in an attempt to bind those class members to its costless settlement with the union (Local 550) — a settlement set aside by the court of appeals because of the union's inadequate representation of the same members of the class. See p. 7, *supra*.

While we believe that in these circumstances TWA waived any defense under former Section 706(d) or was estopped from asserting such a defense, it is unneccessary for the Court to resolve the matter. As we have explained, the pivotal question is whether the district court, before it issued the seniority order challenged by the union, should have been persuaded by the 1978 jurisdictional opinion of the court of appeals (see pp. 22-23 *supra*). Our discussion above demonstrates, we submit, that the court of appeals misconstrued former Section 706(d) and that the district court wisely chose not to follow that ruling. Had the court of appeals reached the correct result in 1978, the only remaining question for the district court on this subject would have been whether TWA could effectively raise the affirmative defense of failure to file within 90 days. Viewed in this light, the settlement agreement represents TWA's relinquishment of its right to litigate further the waiver and estoppel questions.[75] The union offers no reason why, after nine years of litigation, TWA should have been forced to continue pursuing this defense when all indications were that it would have been rejected. See I J.A. 100a-101a. Since the union's various arguments in this Court are based on the assumption that the district court had no jurisdiction over the claims of subclass B members because former Section 706(d) is jurisdictional and can never be waived, and since the assumption is incorrect, the Court need proceed no further in disposing of this case.[76]

---

[75] See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

[76] See the union's concession on this subject, quoted at note 41 *supra*.

III.

REGARDLESS OF HOW THIS COURT CONSTRUES FORMER SECTION 706(d), THE DISTRICT COURT PROPERLY APPROVED THE SETTLEMENT AND ORDERED RETROACTIVE SENIORITY

In the typical case, a court considering a proposed settlement agreement would not "decide the merits of the case or resolve unsettled legal questions."[17] Quite obviously, this is not a typical case. The "unsettled" legal question we have just discussed — whether former Section 706(d) is subject to waiver or estoppel — is now before the Court despite the settlement agreement of 1979 in which TWA and the plaintiff class agreed to relinquish their opportunity to have the Court decide this issue.[18] In this part, however, we shall confine our arguments to showing why the district court properly approved the settlement and ordered retroactive seniority regardless of how this Court ultimately construes that statutory provision.

The Court will find little in the union's Brief that is relevant to this subject.[19] While the union appears to devote the bulk of its Brief to an attack directed solely at the settlement agreement, the union's objections are in fact of a far different

---

[17] *Carson* v. *American Brands, Inc.*, *supra*, _____ U.S. at _____ n.14, 101 S. Ct. at 998 n.14.

[18] As we have indicated (pp. 12-14 *supra*), the settlement agreement provided that TWA and the plaintiff class would dismiss their pending certiorari petitions (Nos. 78-1545, 78-1549) when the district court's order approving the settlement was no longer subject to judicial review. The union's appeal of this order (and the order granting retroactive seniority) forestalled implementation of the settlement agreement and, thus, the parties' dismissal of their certiorari petitions, one of which (No. 78-1545) the Court subsequently granted and the other of which is still pending (II J.A. 212-213).

[19] See also our earlier discussion, at pp. 17-23 *supra*.

nature. When we are told that the parties "used the settlement agreement to confer jurisdiction" on the district court,[40] we know that the union is either operating under a misconception about the procedural posture of this case or is merely arguing that former Section 706(d), should be considered jurisdictional without directly saying so. We know this because the district court's previous ruling, not the settlement agreement, supplied the jurisdictional predicate for its orders ending the case in 1979,[41] as both the district court[42] and the court of appeals held.[43] The parties could hardly confer jurisdiction on a court that had already ruled it had jurisdiction.

We know as well that when the union protests the order approving the settlement agreement (or, more accurately, the separate order granting seniority) on the basis that there had been no finding that TWA violated the Title VII rights of the class members,[44] the union must mean this and nothing more: that subclass B members were not the victims of TWA's illegal actions because, under former Section 706(d), the district court should not have exercised jurisdiction over their claims. Otherwise, the union's assertions fly in the teeth of the district court's decision on summary judgment that *all* members of the class were victims of Title VII violations by TWA (I J.A. 133a-134a).

---

[40] Union Brief, at p. 43; see also *id.* at 37-44.

[41] As we previously noted (p. 21 *supra*), the court of appeals stayed its mandate after ruling in 1978 that the claims of subclass B members were jurisdictionally barred, and thus left standing the district court's 1976 order that it had jurisdiction over these claims.

[42] Order of September 14, 1979 (Pet. App. No. 80-951, at 13a-15a).

[43] See *id.* at 4a, 8a. The union makes a quite telling concession, as we have previously mentioned: "Indeed, if the parties had not used the settlement agreement to confer jurisdiction for the purpose of a seniority grant, there would have been no one objecting to the court's actions" (Union Brief, at p. 43).

[44] See, *e.g.*, the Union's Brief, at pp. 28-30, 37, 49.

In sum, the arguments the union musters against the settlement and the seniority award depend on whether this Court construes Section 706(d) as a jurisdictional requirement. We have already addressed that issue and as we stated above, our arguments in this part proceed on the basis that regardless of the Court's eventual view of the statute, the judgment in No. 80-951 should be affirmed.

The uncertainty and cost of litigation, crowded dockets and the long wait for final judicial determination are the reasons why many cases are settled. This case is no exception. In reaching an agreement to end their dispute, the parties necessarily assessed the strengths and weaknesses of their respective legal and factual positions.[15] "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co., supra*, 402 U.S. at 681.

In Title VII cases especially, the courts look with favor on such compromises.[16] As the Court recently stated, "In enacting Title VII Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."[17] The settlement agreement here is consistent

---

[15] See *Protective Committee for Independent Stockholders* v. *Anderson*, 390 U.S. 414, 434 (1968):

> Litigation and delay are always the alternative to settlement, and whether that alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of litigation.

[16] In general, "It is well recognized that settlement agreements are judicially favored as a matter of sound public policy." *Speed Shore Corp.* v. *Denda*, 605 F.2d 469, 473 (9th Cir. 1979). See *Williams* v. *First Nat'l Bank*, 216 U.S. 582 (1910).

[17] *Carson* v. *American Brands, Inc., supra*, ____ U.S. at ____ n.14, 101 S. Ct. at 998 n.14; see *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 44.

with the strong Congressional policy of ending Title VII controversies short of full litigation. The union's position is squarely against that policy.

There is no sound reason why the district court here should have refused to approve what the parties proposed. The fact that one of the points of dispute between TWA and the class had concerned the meaning of former Section 706(d) was not a sufficient basis for rejecting the settlement. In the summer of 1979, ultimate judicial resolution of that issue was in doubt. It depended then, as it does now, on the opinion of this Court. Neither side could have been *certain* of the outcome, no matter how strongly they believed in their contentions.

Such uncertainty, as we have said, is one of the primary reasons for compromise. This case, however, is somewhat unusual because the doubts about its outcome resulted from proceedings at the appellate level. The district court had found jurisdiction and a violation; the question of remedy remained. In these circumstances, to suggest that the parties could not settle the case, dismiss their certiorari petitions and leave to the district court's discretion the question of retroactive seniority is to argue that retroactive seniority may be awarded only *after* the appellate courts agree that the plaintiffs have a valid claim for relief. In other words, a Title VII class action such as this cannot be settled and seniority cannot be awarded until the case has been fully litigated at trial and on appeal — which is to say such cases will not be settled.[*]

---

[*] For reasons that are far from apparent, the union makes the remarkable assertion that Title VII class actions could be settled without court approval despite the requirement of Rule 23(e), Fed. Rules Civ. Pro., that "a class action shall not be dismissed or compromised without the approval of the court. . . ." (Union Brief, at p. 43). In asserting that Rule 23(e) settlement approval is merely "convenient" and "not indispensable" (*ibid.*), the union could not be more mistaken. The general provision in Rule 41(a)(1) allowing voluntary dismissals without court approval specifically excepts

But seniority awards, even in fully litigated cases, are made *before* the underlying findings at the trial court level are tested on appeal. We are aware of no rule of law — the union certainly has cited none — requiring, in Title VII cases, that the district court withhold retroactive seniority relief unless the defendant-employer has exhausted all interloctory appeals. Yet the posture of this case before the district court in 1979 was the same as it would have been if TWA has not sought appellate review of the interlocutory orders and had instead settled the case in the face of the rulings against it.[89] We do not dispute that in such a case, the union could intervene as it did here for the purpose of demonstrating that an award of retroactive competitive seniority would be inappropriate. See *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330, 1335 (5th Cir. 1979). We disagree, however, with the union's contention not only that it had a right to a hearing,[90] but also that it alone had the right to decide whether the plaintiffs were entitled to such relief.[91]

The union does not challenge this Court's decision in *Franks* v. *Bowman Construction Co., supra,* 424 U.S. at 777, that the remedy of retroactive seniority for victims of Title VII violations is "presumptively necessary."[92] Indeed, the

---

Rule 23(e). See 7A Wright & Miller, *Federal Practice and Procedure* §1797, at 226-227 (1972).

[89] That is precisely what occurred in the American Airlines case, which had been consolidated with this case: the airline withdrew its interlocutory appeals and reached a settlement similar to the one involved here; the district court ordered retroactive competitive seniority after the union intervened; and the court of appeals affirmed. See note 18 *supra*. Justice Powell, joined by the Chief Justice and Justice White, dissenting in *United Airlines, Inc.* v. *McDonald, supra*, cited the court of appeals' opinion in American Airlines with approval, as we have mentioned. See notes 18, 68 *supra*.

[90] As we have discussed, the union presented documentary evidence, called witnesses and argued before the district court in this case (see p. 13 *supra*).

[91] See, *e.g.*, the union's Brief, at p. 36.

[92] See, *e.g.*, the union's Brief, at pp. 29-31, 37.

union does not contest the award of such relief to the members of subclass A.[93] With respect to subclass A, the union therefore must concede that the court's order does not "change the contractual seniority rules,"[94] deprive the union "of its contractual rights,"[95] nullify "valuable competitive status seniority rights" of incumbents,[96] or override "IFFA's collective bargaining agreement."[97] Yet the only difference between subclass A and the 172 members of subclass B who might return to the bargaining unit is the date on which they were fired for becoming mothers. The union's protest is thus not rooted in principles of collective bargaining. Its objection here, as elsewhere, is that the district court should have been persuaded by the 1978 ruling of the court of appeals or, at the least, should not have allowed the case to end before this Court had spoken. We can perceive no reason why such an objection entitles the union to decide whether to allow the seniority remedy for the members of subclass B.

In short, the union's complaint that the district court should have acquiesced in the 1978 appellate ruling excluding subclass B members did not convert the union into the final arbiter of what relief those class members should be awarded. Neither did it entitle the union to force TWA and the plaintiff class "against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither par-

---

[93] See note 29 *supra*.

[94] Union Brief, at p. 17.

[95] *Ibid.*

[96] *Id.* at 20.

[97] *Id.* at 43. The union, in any event, mischaracterizes the effect of the seniority order. As in *Franks* (424 U.S. at 765-766), the district court did not rewrite or supersede the collective bargaining agreement's seniority system, but merely ordered "a seniority remedy slotting the victim in that position in the seniority system that would have been [hers] had [she]" not been fired for becoming a mother.

ty desires to risk."[98] The union was, at most, entitled to a hearing on the remedy issue. This it received. Since the propriety of the seniority award entered after the hearing is no longer an issue in this case,[99] the judgments of the lower courts rejecting the union's objections are final and there is no further need to "judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement."[100]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals in No. 78-1545 should be reversed insofar as it rests on the misinterpretation of former Section 706(d) and the judgment in No. 80-951 should be affirmed. In the alternative, if the Court does not deem it appropriate to reach the issue in No. 78-1545, the judgment in No. 80-951 should be

---

[98] Order of September 14, 1979, Pet. App. 80-951, at 15a, quoted in the opinion of the court of appeals in No. 80-951, *id.* at 8a.

[99] II J.A. 213. The statements in the union's Brief about the present situation at TWA, which are not supported by the record (*e.g.* union Brief, at pp. 7-10) are thus immaterial and we take no position on whether the union's statements are accurate.

[100] *Carson* v. *American Brands, Inc., supra,* _____ U.S. at _____ n.14, 101 S. Ct. at 998 n.14.

affirmed and the judgment in No. 78-1545 should be vacated with instructions to dismiss the appeal as moot in light of the settlement of the case.[101]

Respectfully submitted,

A. RAYMOND RANDOLPH, JR.
SHARP, RANDOLPH & GREEN
Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 659-2400

KEVIN M. FORDE
111 W. Washington Street
Chicago, Illinois 60602
(312) 726-5015

ARAM A. HARTUNIAN
55 E. Monroe Street
Chicago, Illinois 60603
(312) 372-6475

ARNOLD I. SHURE
10 S. LaSalle Street
Chicago, Illinois 60603
(312) 346-4537

Counsel for Anne B. Zipes, et al.

AUGUST 1981.

[101] TWA's pending Petition for a Writ of Certiorari in No. 78-1549 (II J.A. 212) should be denied.